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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

LARRY RISK, et. al.,
Petitioners,

VS.

THE KINGDOM OF NORWAY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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ON BEHALF OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

When, in passing the Foreign Sovereign Immunities Act (28 U.S.C. § 1605), Congress expanded the liability of foreign states for torts committed by their agents on American soil, did it nonetheless intend that felony offenses of such agents, if authorized by their governments, be considered "discretionary" within the meaning of 28 U.S.C. § 1605(a)(5)(A), thereby immunizing a foreign state from suit by a United States citizen who has suffered profound injury due to the crime of that foreign sovereign's agent?

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OPINION BELOW

The decision of the Ninth Circuit panel, rendered June 5, 1991, is reported officially at 936 F.2d 393; the text of that official report is contained in Appendix A to this petition. The final order denying rehearing, issued August 16, 1991, is unpublished and is found in Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's opinion was filed on June 5, 1991. The petition is timely, rehearing having been denied by the Ninth Circuit on August 16, 1991. See Appendix at B; *see also* Sup.Ct.R. 20.4.

STATUTE INVOLVED

1. Foreign Sovereign Immunity Act (hereafter "FSIA"), 28 U.S.C § 1605(a):

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —

* * *

(5) [I]n which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to —

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . .

STATEMENT OF THE CASE

In 1988 Larry Risk and his two children, Karima and Jamil Risk, filed suit against the government of Norway, two of its consular officials, a Norwegian corporation, and several Norwegian citizens, including Larry Risk's former wife, Elisabeth Antonsen Risk. (ER 1-2).[1] The suit alleged each of the defendants conspired with Elisabeth Risk, Karima's and Jamil's mother, to abduct the children from California to Norway in 1984, in violation of a California custody order requiring the children to remain in the Bay Area. (ER 1-16). The suit sought damages for torts resulting from the abduction and removal to Norway of the Risk children.

In an opinion reported at 707 F.Supp. 1159 (N.D. Cal. 1989), the District Court for the Northern District of California dismissed the government of Norway from the action. The court

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[1]ER refers to Appellant's Excerpt of Record, filed with the Ninth Circuit; SER refers to Appellee's Supplemental Excerpt of Record. CR refers to records contained in the district court docket.

held that it lacked subject matter jurisdiction over Norway as a result of the nation's sovereign immunity.[2] The Ninth Circuit affirmed the dismissal. 936 F.2d 393 (9th Cir. 1991).

STATEMENT OF FACTS

Larry Risk married Elisabeth Antonsen Risk in March 1977, in San Francisco.[3] Their children, Karima and Jamil, were born in San Francisco on October 21, 1977 and October 14, 1980. The couple maintained a residence in San Francisco during the length of the marriage. Each of the Risk children is an American citizen and has been issued an American passport. (ER 3).

In the summer of 1983, Larry Risk, a schoolteacher, took a sabbatical and traveled to Norway, with his wife, a Norwegian, and his children. After a few months, his wife experienced psychological problems and was hospitalized. After some time, Mr. Risk returned to the United States with his children, who spoke no Norwegian and had never before been to Norway.

In January of 1984, during a visit by Larry Risk and his children to his parents' home in Indiana, Elisabeth arrived and sued for custody of her children, raising as the basis of her claim a Norwegian custody decree obtained in the late 1983.

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[2]In the same opinion, the district court dismissed two Norwegian consular officials from the action on the basis of the Vienna Convention on Consular Relations (VCCR). Although that ruling was challenged and affirmed on appeal to the Ninth Circuit, it is not the subject of this petition. The VCCR, an international treaty, was intended to shield consular officials from suit; FSIA, on the other hand, was intended by Congress to make foreign states liable for torts committed by agents — e.g., diplomats — who are plainly immune from personal liability. Any immunity possessed by consular officials under the VCCR is thus quite irrelevant to the issue petitioner now brings before the Court.

[3]The facts below are taken from the complaint filed April 19, 1988. In reviewing the district court's decision to dismiss Norway for lack of subject matter jurisdiction, the Ninth Circuit was required to assume that the allegations in the complaint are true. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

On January 20, 1984, the issue of the validity of the 1983 Norway decree was adjudicated in the Marion Superior Court in Indiana before Judge Richard L. Milan (Action No. S484-0007). The court found, upon facts stipulated to by both Larry and Elisabeth Risk, that "the Norwegian decree was entered four months after the children came into the country of Norway, and that the Norwegian court thus had no jurisdiction under the Uniform Child Custody Act to enter a valid decree." Milan then transferred the case to San Francisco for further proceedings.

Defendant Elisabeth Antonsen Risk then filed a petition in the San Francisco Superior Court seeking custody of Jamil and Karima Risk. At a hearing on the petition held on January 27, 1984, the parties stipulated that the San Francisco Superior Court of the State of California was the proper court to decide the custody issue. (ER 4). Judge Isabella H. Grant of the San Francisco Superior Court awarded joint legal and physical custody of the Risk children to both parents. Physical custody was to alternate between Larry and Elisabeth Risk on a weekly basis. The court provided for the children to remain in the family home in San Francisco, their lifetime residence, while requiring the parents to occupy the house during alternating weeks of actual custody.

The court expressly prohibited either parent from removing the Risk children from San Francisco, Marin, Alameda, Contra Costa, San Mateo or Santa Clara counties without prior written consent of the other parent, or an order of the San Francisco Superior Court. The Risks' passports were surrendered to the control of the Superior Court as a condition of the decree. (ER 4-5).

Both Risk parents were prohibited from applying for or obtaining passports for their children, or from directing any other party to apply for or obtain passports on the children's behalf. The parties were warned that violation of any travel restriction imposed by the court would result in a grant of sole custody to the

non-offending parent. An order containing these provisions was issued on January 30, 1984. (ER 4-5).[4]

A week after the custody decree, Elisabeth Risk began an effort to circumvent its provisions. On February 9, 1984 she wrote to the Norwegian Foreign Ministry in Oslo, to inform the Ministry of the provisions of Judge Grant's order. The letter, which was delivered via the Norwegian Consulate General in San Francisco, also was forwarded to Norway's Justice Ministry. The Norwegian Government responded to the letter by providing Elisabeth Risk with money to cover her legal and living expenses. (ER 5-6).

During the pendency of the custody proceedings Elisabeth Risk resided at the Norwegian Seaman's Church in San Francisco. She contacted Johans Sandvin, personnel director of the Norwegian Seaman's Mission (an affiliate of the Church), and informed him of the custody proceeding and ultimately of the January 30, 1984 custody order, including the travel restrictions. Sandvin spoke with officials of the Norwegian Justice Ministry who told him they were aware of the conditions of the order, that the outcome of the custody matter would have been different in Norway, and that Elisabeth Risk's case in the United States was "hopeless." An official in the Justice Ministry informed Sandvin that the best approach to the problem was for Elisabeth and the children to travel to Norway. (ER 6).

Sandvin then contacted Olaf Solli, Norway's Consul General in San Francisco, who, after learning of the custody order's restrictions, suggested that Elisabeth circumvent them by travelling with the children to Norway via Canada. Sandvin then called the Consul General in Los Angeles, K.I. Halvorsen, who, after

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[4]Given Antonsen Risk's stipulation to the San Francisco court's jurisdiction, its decree is obviously valid. In any case, neither Norway nor Antonsen Risk could challenge the decree's validity in any federal action such as this one. While federal courts may entertain a suit for damages arising out of a violation of a state custody decree, they are barred by the "domestic relations" exception to federal jurisdiction from considering the underlying merits of that decree. See, e.g., *McIntyre v. McIntyre*, 771 F.2d 1316, 1317 (9th Cir. 1985). Such challenges must thus be brought in the courts of the state granting the custody order.

learning of the order's provisions, suggested that Elisabeth Risk and her children should be supplied with identification papers which would allow them to travel to Norway, despite their lack of passports, in violation of the decree. (ER 6-7).

On July 16, 1984, Elisabeth Antonsen Risk, Johans Sandvin, and the Risk children traveled to Los Angeles International Airport where they were met by K.I. Halvorsen. Halvorsen personally delivered a Norwegian Seaman's Certificate of Identity which contained an attestation by the Consul General that Elisabeth Antonsen Risk was a Norwegian subject. The Certificate was dated July 16, 1984, and included the first names and birth dates of the Risk children. The children's last names were falsely changed to Antonsen on the document. On that date, Antonsen Risk and the Risk children flew to Norway and have never returned. The Norwegian Ministry of Justice paid the travel costs of Antonsen's abduction of the children. (ER 7).

Larry Risk contacted Halvorsen after the children's disappearance, but the Consul General denied having been contacted by Elisabeth Antonsen Risk and asserted that he had never heard of her. (ER 8). In advising and assisting Elisabeth Antonsen Risk, both Solli and Halvorsen were fully aware of the provisions of the California custody decree and conspired with Mrs. Risk to violate the provisions of that decree. (CR 12).

After exhausting other avenues of relief, Larry Risk filed suit in response to the abduction of his children in blatant violation of the California custody order. His complaint alleged, *inter alia*, damages resulting from the effort by Norwegian officials, with Elisabeth Antonsen Risk, to violate the 1984 San Francisco Superior Court order.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The question raised in this petition has broad implications for the redress of criminal acts by agents of foreign governments in the United States. The crimes perpetrated by Norwegian agents in this case have robbed, perhaps permanently, a father of the love

of his children, and those children of that of their father. Larry Risk has not seen his children since their abduction.

Officials of the Norwegian Government, including members of its Justice Ministry, Foreign Ministry, and Consul Generals conspired with Elisabeth Antonsen Risk to violate a valid California custody decree in contravention of California Penal Code § 278.5.[5] Indeed, a criminal arrest warrant for Elisabeth Risk for her role in the affair remains outstanding. (CR 35 Exhibit B). Under California law a conspiracy to commit a felony child abduction constitutes both a separate felony (Cal. Pen. Code § 182) and an actionable tort. *Rosefield v. Rosefield*, 221 Cal.App.2d 431 (1963).

Norway was a key participant in the abduction of the Risk children. Its Justice Ministry counseled Elisabeth Risk to abduct the children. Knowing the passports of Elisabeth and the children had been surrendered to the California courts, the Norwegian Foreign Ministry provided false "seaman's papers" allowing her to travel to Norway. Norway's consular officials were participants in sheparding the Risk children out of the country, and the Norwegian government provided funds needed for the flight from California. Norway's agents acted at all times with full knowledge of the terms of the California custody order, and with the expressed intent of violating those terms.

In his suit, Mr. Risk seeks redress for the harm caused by Norway's criminal acts. The question for review in this Court is whether United States law provides a means for such redress. It would certainly seem likely that Congress, to the extent it

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[5]Penal Code § 278.5 states:

> (a) Every person who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison for 16 months, or two or three years, a fine of not more than ten thousand dollars ($10,000), or both; or by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both.

provided any redress for wrongs committed by foreign agents, would direct it first and foremost at victims of violations of the criminal laws of our state and federal governments. The Ninth Circuit panel, however, held relief is only available to victims of foreign agents when those agents have violated the laws of *their own foreign government.*[6] Under such a ruling, the scope of FSIA, a Congressional statute, and the redress it provides to American citizens vary from case to case, depending on the letter and spirit of the law of foreign nations: the more inhumane the law of a foreign nation, the more freedom its agents enjoy to commit crimes against humanity on United States soil. It is incumbent on this Court, the ultimate judicial authority of this nation, to decide whether Congress in fact crafted such a startling piece of legislation.

II.

AS WITH THE FEDERAL TORTS CLAIMS ACT, CONGRESS INTENDED FSIA TO PROVIDE REDRESS FOR INJURIES RESULTING FROM THE COMMISSION OF CRIMES BY AGENTS OF GOVERNMENTS

Larry Risk filed this action under provisions of the Foreign Sovereign Immunity Act, 28 U.S.C § 1605(a),[7] which permit plaintiffs to sue foreign governments for torts committed in the United States that result in personal injury or death. *Id.* § 1605(a)(5). FSIA excludes from the jurisdiction of United States courts claims which, although within the purview of § 1605(a)(5), are "based upon the exercise or performance or the failure to exercise or perform a *discretionary function* . . . . " *Id.* at § 1605(a)(5)(A) (emphasis added).

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[6]Conceding that, if proved, the Norwegian officials' actions were a crime in California, the panel denied liability because: "There is no assertion that the Norwegian officials violated any Norwegian law." 936 F.2d at 396.

[7]Pub.L. No. 94-583, 90 Stat. 2891-92, 2894-98 (1976), *codified at* 28 U.S.C. §§ 1330, 1332(a)(2),(4), 1391(f), 1441(d), 1602-1611.

The overriding purpose of the FSIA was to codify a movement in international law from absolute to "restrictive" immunity of foreign governments in the courts of a forum country. H.R. Rep. No. 94-187, 94th Cong., 2d sess. 7 (1976), *reprinted in U.S. Code Cong. & Admin. News p.6604, 6605* (1976) ("Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts . . . and does not extend to suits based on its commercial or private acts."); *see Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 645 (9th Cir. 1984).

The "Noncommercial torts" section, 28 U.S.C. 1605(a)(5), was part of this effort to restrict the application of sovereign immunity. The provision was

> directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages . . . . It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its employees . . . .

Id. at 6619. Its effect was to provide an avenue of redress to American citizens for the commission of torts by foreign governments.

The statute provided only two narrow exceptions to the general prohibition on using sovereign immunity as a defense to tort actions: the discretionary function exception, 28 U.S.C. §§ 1605(a)(5)(A); and an exception for claims arising out of malicious prosecution, abuse of process libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 1605(a)(5)(B). Indeed, only a single sentence in the house report is devoted to these exceptions: "The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act [hereafter "FTCA"], 28 U.S.C. § 2680(a) and (b)." *Id.* at 6620.[8]

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[8]Federal courts faced with FSIA disputes consistently have been guided by decisions construing the discretionary function analysis con-

Federal courts, in both the FSIA and FTCA contexts, have recognized that although criminal acts by a sovereign or its agents may involve a high degree of judgment, they fall outside the protection of the discretionary function exception. Although a sovereign may choose as a matter of policy to violate a criminal statute, it cannot be said to have exercised the kind of discretion intended to be protected by the exception.

So, for example, in *Cruickshank v. United States*, 431 F.Supp. 1355 (D. Hawaii 1977), plaintiff sued the United States for invasion of privacy after discovering the government had illegally tampered with his letters to the U.S.S.R. The district court held the discretionary function exception to the FTCA did not apply because the government was without discretion to commit a patently illegal act. *Id.* at 1358-59; *accord Birnbaum v. United States*, 588 F.2d 319, 329 (2d Cir. 1978) (illegal opening of mail by government agency not protected by the discretionary function exception); *Socialist Workers Party v. United States*, 463 F.Supp. 515, 526 (S.D.N.Y. 1978) ("A discretionary function can derive only from properly delegated authority. The function must be within the authority of an agency or official . . . ."). *See also Hathahley v. United States*, 351 U.S. 173, 181 (1956) (Illegal acts by government agents do not fall within the discretionary function exception.).

Not surprisingly, federal courts have relied on the foregoing cases to hold that illegal acts by *foreign* sovereigns fall outside the scope of the discretionary function exception contained in FSIA. In *Letelier v. Republic of Chile*, 488 F.Supp. 665 (D.C.D.C 1980), plaintiffs sued Chile under FSIA for torts connected with the assassination of a former Chilean ambassador and his assistant. The court rejected the argument that a decision to carry out this crime could escape FSIA jurisdiction because it was discretionary:

> While it seems apparent that a decision calculated to result in injury or death to a particular individual or individuals, made for whatever reason, would be one most assuredly

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tained in the Federal Tort Claims Act. *See MacArthur Area Citizens Association v. Republic of Peru*, 809 F.2d 918, 921-22 (D.C. Cir. 1987).

> involving policy judgment and decision and thus exempt as a discretionary act under section 1605(a)(5)(A), that exception is not applicable to bar this suit. *As it has been recognized, there is no discretion to commit, or to have one's officers commit, an illegal act.*

Id. at 673 (citing *Cruikshank v. United States*, 431 F.Supp. 1355, 1359 (D.Hawaii 1977)) (emphasis supplied).

Similarly in *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), plaintiff filed suit pursuant to FSIA for torts connected with the assassination of her husband by agents of the Republic of China ("ROC"). Considering whether the discretionary function exception applied to the decision to carry out the killing, the Ninth Circuit found that ROC agents were without discretion to murder, noting that the crime was also a violation of ROC law. *Id.* at 1431; *see also Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1026-27 (9th Cir. 1987)(destruction of property not within the discretion of a sovereign); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1518 (9th Cir. 1987) (not within the discretion of the Mexican government to commit assault, battery and other alleged torts on plaintiff).

As a group these cases, along with those decided in the FTCA context, agree that sovereigns cannot be permitted to hide behind the discretionary function exception when they commit serious crimes.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN INTERPRETATION OF FSIA CREATED BY THE OPINION BELOW AND TO DECIDE A QUESTION OF PARAMOUNT IMPORTANCE CONCERNING THE RESPECTIVE RIGHTS OF FOREIGN GOVERNMENTS AND AMERICAN CITIZENS

This Court should consider the issue presented in this case because the decision of the Ninth Circuit panel is squarely in conflict with the *Letelier* opinion, and conceptually in conflict

with FTCA cases decided by this Court (*Hathahley*), and by the Second Circuit (*Birnbaum*).

The panel rejected Risk's argument that because Norway's acts were criminal under California law, the discretionary function exception should not apply. 936 F.2d at 396-97. In distinguishing the two primary cases cited by Risk, *Liu* and *Letelier*, the Ninth Circuit panel created an unsettling rule regarding the permissibility of criminal conduct by agents of foreign sovereigns in the United States.

Liu and *Letelier* both held foreign governments liable under FSIA for the actions of their agents. The *Risk* panel, however, chose to read *Liu* in a manner at odds with *Letelier*:

> [In *Liu*, t]his court refused to apply the discretionary function exception to the FSIA. We held that because the acts in this (sic) case violated ROC law, they were not discretionary and thus fell outside coverage of the discretionary function exception. . . . [*Liu*] has no application to the facts here. *There is no assertion that the Norwegian officials violated any Norwegian law.*

Id. at 396. (emphasis added). The Circuit panel thus held that so long as an act plainly criminal under American law does not demonstrably violate the foreign sovereign's law, as it did in *Liu*, the discretionary function exception is applicable to that crime on United States soil. In the panel's view, Congress, in deliberately abrogating the rule that sovereigns are absolutely immune to tort suits in American courts, nonetheless intended to leave the power to define the scope of tort liability in the hands of foreign states.

If the Ninth Circuit's rule is correct, *Letelier* was wrongly decided. The plaintiff in that case would have been hard pressed to prove that General Pinochet or his henchmen lacked the power under Chilean law to order his security agents to murder opponents of his government living in the United States.[9] But *Letelier*, which rejected the notion that criminal activity is discretionary if

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[9]The panel's opinion in fact suggests that *Letelier* is based more on sentiment than clear thinking: "[T]he nature of the act in that case [murder] obviously influenced the court." 936 F.2d at 396-397.

approved by a foreign state, was not wrongly decided. The discretionary function exception correctly did not apply in that case because "there is no discretion to commit, or to have one's officers or agents commit, an illegal act." 488 F.Supp. at 673. The fact that a dictator signs a law giving himself power to assassinate his enemies logically should not affect tort liability under FSIA. This Court should grant certiorari to confirm *Letelier*'s proper reading of FSIA.

Furthermore, the potential consequences of the panel's ruling are ominous. Consider the following hypothetical: A Tienanmen Square dissident flees to this country, marries, and has a child with an American citizen. He continues his political criticism of the land he left. Under Chinese law, the child, plainly an American citizen, also is a citizen of China. A Chinese court finds that the parents are unsuitable and awards custody to their grandparents, still residents of China. At the grandparents' request, Chinese consular officials stationed in the United States abduct the children from their parents and remove them to China. The abduction is perfectly legal under Chinese law, though it plainly constitutes a felony in the United States. The American parents are without an avenue of redress against the Chinese government because, under the rule of this case, the discretionary function exception would properly be applied.

Other remarkable anomalies flow from the panel's decision. One, victims of car accidents clearly can seek relief under FSIA, but victims of government-sponsored kidnappings could not. Two, since United States officials plainly enjoy no immunity for criminal acts under FTCA, citizens of this country victimized by crimes would have greater redress against the United States government than against those of foriegn countries. Whatever theoretical arguments in support of such differences in liability might be mustered, it is hard to imagine that the elected representatives of the American people wrote them into law. Whether they did is certainly a question meriting this court's attention.

CONCLUSION

With knowledge of the existence of a valid California custody order, Norway and its agents assisted Elisabeth Antonsen Risk in illegally removing her children from the United States. Norway's acts, which the Ninth Circuit found were protected by the discretionary function exception, amount to a felony under California law. Before this decision, there was no precedent under FTCA or FSIA for the proposition that sovereigns have discretion to commit serious criminal acts with impunity. Now, the Ninth Circuit has held that felonious acts can be protected by the discretionary function exception. Congress did not intend to create impunity for crime. The discretionary function exception exists to allow sovereigns to carry out social and political agendas without fear of tort liability. It simply should not be within the power of a foreign government to commit felonies on this country's soil in the name of "policy." This Court should settle this issue by granting certiorari and adopting the bright-line rule contained in *Letelier*: there is no discretion under § 1605(a)(5)(A) of FSIA to commit, or to have one's agents commit, an act constituting a felony under United States law.

For the reasons stated above, this petition for a writ of certiorari should be granted.

Dated: November 14, 1991

Respectfully submitted

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Attorney for
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APPENDIX A

LARRY RISK, individually and as Guardian Ad Litem for KARIMA RISK and JAMIL RISK, *Plaintiff-Appellant,*

vs.

K.I. HALVORSEN; OLAF SOLLI, *Defendants-Appellees.*

LARRY RISK, individually and as Guardian Ad Litem for KARIMA RISK and JAMIL RISK, *Plaintiff-Appellant,*

vs.

KINGDOM OF NORWAY, *Defendant-Appellee.*

Nos. 88-15803, 89-15701.

United States Court of Appeals, Ninth Circuit

Argued and Submitted Oct. 4, 1990.

Decided June 5, 1991.

[Headnote Omitted]

Before SCHROEDER, FERGUSON and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

Appellant Larry Risk, individually and as guardian *ad litem* for his two minor children, sued the Kingdom of Norway ("Norway") and two Norwegian Consular officials, Knut Halvorsen and Olaf Solli ("Halvorsen" and "Solli"), for torts allegedly committed by those parties in connection with the removal of Risk's children from California in violation of a temporary custody order of the San Francisco Superior Court. The complaint alleges (a) interference with parent-child relations; (b) intentional infliction of emotional distress; and (c) the existence of a conspiracy to remove the children from California.

In separate orders, the district court dismissed these parties from the action, finding that they are immune from civil liability for the acts alleged in the complaint. 707 F.Supp. 1159. We assert jurisdiction under 28 U.S.C. § 1291 and affirm.

FACTS

In 1977 Plaintiff Larry Risk married Elisabeth Antonsen Risk, a native and citizen of Norway. In 1983 the Risk family — Larry, Elisabeth and their two children — moved to Norway for a period. After an attempt by Larry to remove the children to the United States, Elisabeth received a temporary order from a Norwegian County Court providing ordinary visitation rights for the father. During the first visitation period Larry returned with the children to the United States.

In 1984 Elisabeth filed a petition in the Superior Court of San Francisco seeking custody of the two children. The parties were awarded joint custody and the superior court order prohibited the parents from removing the children from the five San Francisco Bay Area counties. In addition, the parties were required to surrender their children's passports and their own to Larry Risk's attorney, and were prohibited from applying for replacement passports without a court order. In July 1984, apparently with the assistance of various Norwegian government officials, Elisabeth Risk returned to Norway with her children.

Larry Risk filed this action in April, 1988, alleging that the Norwegian government and its consular officials conspired to violate and in fact violate the 1984 California custody order by suggesting to Elisabeth Risk that she return to Norway with the children; by providing travel documentation for Elisabeth and the children; by providing financial assistance to Elisabeth to make the trip; and, finally, by obstructing Larry Risk in his effort to locate and contact his children.

DISCUSSION

I. Standard of Review

[1] The district court's separate decisions dismissing appellees from the action involved pure questions of law, and as such, are reviewed do novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

II. Dismissal of Norway

Appellant argued in the district court, and asserts here, that Norway is within the jurisdiction of the trial court under the Foreign Sovereign Immunity Act of 1976 ("FSIA").[1] The Act provides that "the district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to relief either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. § 1330(a).

A.

The district court rejected jurisdiction over Norway under the FSIA because of an exception to the general jurisdiction provision, section 1605(a)(5), which excludes claims based on the exercise or performance, or failure to exercise or perform, a discretionary function.[2]

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[1]Pub.L. No. 94-583 90 Stat. 2891-92, 2894-98 (1976), *codified at* 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611.

[2]28 U.S.C. 1605(a) provides that a foreign state is not immune from the jurisdiction of courts of the United States . . . in any case —

* * * * * * * *

> (5) [i]n which money damages are sought against a foreign state for personal injury or death . . . occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except that this paragraph shall not apply to —

[2] Whether the acts of the Norwegian officials are within the discretionary function exception to the FSIA is controlled by principles developed under the Federal Tort Claims Act ("FTCA"). *Joseph v. Nigeria*, 830 F.2d 1018, 1026 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988). First, we "must determine whether the government employee had any discretion to act or if there was an element of choice as to appropriate conduct." *Liu v. Republic of China*, 892 F.2d 1419, 1431 (9th Cir. 1989), *cert. dismissed*, ____ U.S. ____, 111 S.Ct. 27, 111 L.Ed.2d 840 (1990) (citing *Berkovitz v. United States*, 486 U.S. 531, 535, 108 S.Ct. 1954, 1957, 100 L.Ed.2d 531 (1988)). Second, we consider "whether the decisions were grounded in social, economic, and political policy," concentrating on "the nature of the conduct, rather than the status of the actor . . . ." *MacArthur Area Citizens Ass'n v. Peru*, 809 F.2d 918, 922 (D.C. Cir. 1987), *vacated on other grounds*, 823 F.2d 606 (1987) (quoting *United States v. Varig*, 467 U.S. 797, 813, 814, 104 S.Ct. 2755, 2764, 2765, 81 L.Ed.2d 660 (1984)).

In *MacArthur*, a neighborhood association sued the Republic of Peru for occupation and use of a building in violation of a zoning ordinance. The circuit court for the District of Columbia held that the discretionary function exception to the FSIA applied because the establishment of a chancery in a particular building, and modification of that building for security purposes, is a discretionary act of public policy, both political and economic in nature. *MacArthur*, 809 F.2d at 923.

In *Joseph v. Nigeria*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988), we declined to apply the discretionary function exception to acts of officials of the Nigerian government which led to a tort suit. In that case, the government officials were accused of destruction of the property in which the Nigerian consulate was located. We held that while acquisition and operation of the property was a discretionary function, purely destructive acts are not part of the

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(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused. . . .

policy decision to establish the consulate and thus fall outside the scope of the discretionary function exception. *Id.* at 1027.

[3] The acts of the agents of the Norwegian government are closer to those of the officials in *MacArthur* and thus the discretionary function exception applies.

The Norwegian officials are accused of advising and assisting a Norwegian citizen and her children in leaving the United States. There can be no doubt the officials here were exercising discretion.

Moreover, each of the acts alleged by appellant are within those expressly within the function of consular officials according to the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77 ("VCCR"). Article 5, sections (d) and (e) of that document, to which the United States and Norway are signatories, defines consular functions in part as "issuing passports and travel documents to nationals of the sending state. . ." and "helping and assisting nationals, both individuals and bodies corporate, of the sending state." Acts covered by the VCCR presumptively are "grounded in social, economic, and political policy" and thus the conduct of the Norwegian officials satisfies the second prong of the discretionary function analysis contained in *Liu*.

B.

Appellant argues that because the acts of the Norwegian officials may constitute a violation of California criminal law,[3] acts should fall outside the scope of the discretionary function exception to the FSIA, and thus that the district court should have retained jurisdiction over Norway. Appellant relies principally on three cases in which federal courts have refused to apply FSIA immunity to criminal acts.

In *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989), the widow of a citizen of the Republic of China ("ROC"), whose

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[3]Intentional violation of a custody order, or of the rights of a parent under such an order is a felony in California. Calif. Penal Code § 278.5 (West 1988).

murder allegedly was directed by the director of that country's Defense Intelligence Bureau, brought a wrongful death suit in federal court. This court refused to apply the discretionary function exception to the FSIA. We held that because the acts in this case violated ROC law, they were not discretionary and thus fell outside coverage of the discretionary function exception. *Id.* at 1431. ("[W]e hold that the discretionary function exception is inapplicable when an employee of a foreign government violates its own internal law."). This case has no application to the facts here. There is no assertion that the Norwegian officials violated any Norwegian law.

Appellant relies next on *Gerritsen v. de la Madrid Hurtado,* 819 F.2d 1511 (9th Cir. 1987). In that case this court also refused to apply the discretionary function exception to Mexican officials who allegedly kidnapped and assaulted the plaintiff in an attempt to prevent his criticism of the Mexican government. This court held that the discretionary function exception did not apply because the acts alleged were not "decisions to 'establish governmental policy' . . . but rather [were] acts to 'carry out policy' or acts at the 'operational level.'" *Id.* at 1518 (citing *Olsen v. Mexico,* 729 F.2d 641, 647 (9th Cir.), *cert. denied,* 469 U.S. 917, 105 S.Ct. 295, 83 L.Ed.2d 230 (1984)). Appellant's reliance on *Gerritsen* is misplaced. This circuit has abandoned the "planning/operations" distinction in conducting discretionary function analysis pursuant to the Supreme Court's decision in *United States v. Varig,* 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984). *See e.g., Mitchell v. United States* 787 F.2d 466, 468 (9th Cir. 1986) (planning-operational distinction has been abandoned), *cert. denied,* 484 U.S. 856, 108 S.Ct. 163, 98 L.Ed.2d 118 (1987); *Chamberlin v. Isen,* 779 F.2d 522, 524 (9th Cir.) (same); *Begay v. United States,* 768 F.2d 1059, 1062-63 n. 2 (9th Cir. 1985) (same).

Finally, appellant relies on *Letelier v. Republic of Chile,* 488 F.Supp. 665 (D.D.C. 1980). In that case, members of the families of a Chilean national and his assistant who were ordered assassinated by members of the Chilean government brought a tort action against Chile in federal court. The district court refused to apply the discretionary function exception to the FSIA,

stating that "there is not discretion to commit, or to have one's officers or agents commit, an illegal act. . . . Whatever policy options may exist for a foreign country, it has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals." *Id.* at 673.

[4, 5] While the Letelier court apparently considered "action that is clearly contrary to the precepts of humanity" outside the scope of the discretionary function exception, *id.*, the nature of the act in that case obviously influenced the court. In this case, the most that can be said is that Norwegian officials issued travel documents to a Norwegian citizen and her children, also citizens of Norway; that they provided funds for her travel; and that they protected her from contact by her former husband. Although these acts may constitute a crime under California law, it cannot be said that every conceivably illegal act is outside the scope of the discretionary function exception. *MacArthur*, 809 F.2d at 922 n. 4.

The district court correctly held that the discretionary function exception to the FSIA applies in this case and that it has no jurisdiction to hear the claims against Norway.

III. Dismissal of Consular Officials

A.

[6] The district court asserted jurisdiction over defendants Solli and Halvorsen, officials of the Norwegian Consulate, under 28 U.S.C. § 1351 which provides: "The district court shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against (1) consuls or vice consuls of foreign states. . . . " Jurisdiction under § 1351 may be limited by treaty. *Gerritsen v. de al Madrid Hurtado* 819 F.2d 1511, 1515 (9th Cir. 1987).

The VCCR governs questions of consular immunity and as such limits jurisdiction under § 1351. *Joseph v. Office of Consulate General of Nigeria*, 830 F.2d 1018, 1027 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988); *Gerritsen*, 819 F.2d at 1515.

Article 43(1) of the VCCR states that "Consular officials and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed *in the exercise of consular functions.*" (emphasis added).

"Consular functions" are defined in Article 5 of the VCCR and include:

> (d) issuing passports and travel documents to nationals of the sending state, . . .
>
> (e) helping and assisting nationals . . . of the sending state;

The district court held that because the acts allegedly undertaken by defendants Solli and Halvorsen fall within those consular activities immunized by the VCCR, consular officials Halvorsen and Solli should be dismissed.

[7] The complaint alleges: (1) that defendant Solli suggested to Johans Sandvin, an employee of the Norwegian Seaman's Mission, that Elisabeth Risk obtain identification papers and travel to Norway via Canada; (2) that defendant Halvorsen delivered to Elisabeth a Norwegian Seaman's Certificate of Identity which contained an attestation by Halvorsen that Elisabeth is a Norwegian subject; and (3) that upon being contacted by Larry Risk, Halvorsen denied knowing Elisabeth. These actions fall within those consular functions specifically immunized by the VCCR sections above. For that reason, the district court was correct to dismiss defendants Halvorsen and Solli from the action.

B.

Appellant argues that the VCCR does not immunize these consular officials for participation in the acts alleged because the Convention does not apply to criminal activity. He relies on *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987). In that case, a plaintiff sued Mexican consular officials for various torts and civil rights violations. Defendants argued that they were immune under the VCCR for the performance of "consular functions." *Id.* at 1516. This court held that no such

immunity existed because the alleged acts of the consular officials, including assault and kidnapping, were not consular functions and thus fell outside the coverage of the VCCR. *Id.* at 1516-17.

Relying on *Gerritsen*, appellant argues that because Solli's and Halvorsen's conduct might be construed as criminal under California law, *see supra note* 3, it should not receive VCCR protection. As the district court noted, the consular activities in Gerritsen were covered by VCCR Article 5, sections (a) and (m), each of which provides immunity for consular actions "provided they are within the limits permitted by international law;" or "are not prohibited by the laws and regulations of receiving state. . . . " 819 F.2d at 1516 (citing 21 U.S.T. at 82-85) (emphasis in the court of appeals' opinion).

The provisions of the VCCR relied on by Solli and Halvorsen (Article 5, sections (d) and (e)), on the other hand, contain no such limiting language. Because the conduct of the consular officials alleged in the complaint falls squarely within these sections of the VCCR, the district court correctly granted these defendants' motions to dismiss.

C.

The district court found, as an alternative ground for dismissing the complaint against Halvorsen and Solli, that the consular officials were entitled to immunity under Article XVI of the Treaty of Friendship, Commerce and Consular Rights between the United States and Norway. We need not address that issue because we hold that the officials are immune under the VCCR.

IV. Conclusion

The district court properly determined that it lacked jurisdiction over Norway because in this case Norway is immune from civil suit under the discretionary function exception to the FSIA. Defendants Solli and Halvorsen correctly were dismissed from the action because they are immune from civil liability under Article 5, sections (d) and (e) of the VCCR. The separate orders

of the district court dismissing Norway, Solli, and Halvorsen from this action are

AFFIRMED.

APPENDIX B

No. 89-15701

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARRY RISK, individually and as Guardian Ad Litem for
KARIMA RISK and JAMIL RISK
Plaintiff-Appellant,

VS.

KINGDOM OF NORWAY,
Defendant-Appellee.

ORDER

D.C. No. CV-88-1435-WWS

Before SCHROEDER, FERGUSON, and BRUNETTI, Circuit Judges:

Judges Schroeder and Brunetti have voted to reject the suggestion for a rehearing en banc. Judge Ferguson so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The suggestion for a rehearing en banc is rejected.

[Filed in this court on August 16, 1991]